IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 475 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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THE STATE OF GUJARAT
THROUGH A.C.P. N.K. AMIN - Appellant
Versus
MOHAMMAD ALI GULAMALI SHAIKH – Respondent

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Appearance :
MR LR PUJARI, ADDITIONAL PUBLIC PROSECUTOR for the Appellant.
MR VIRAT G POPAT WITH MR SV RAJU for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 03/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal is preferred by the State of Gujarat under Section 34 (4) of Prevention of Terrorism Act, 2002 (“POTA”, for short) for cancellation of bail granted passed by the learned Special Judge (POTA), Ahmedabad by order dated 09-05-2005.

2. As per the prosecution case, the respondent, who is an Advocate by profession, is charged with offences punishable under Sections 120B, 121, 121A, 122 and 123 of Indian Penal Code, 1860 read with Sections 25 (1A), 27 and 29 of the Arms Act and Sections 3(1)(a)(b), 3(3), 4, 20, 21(2)(b), and 22(3)(a), 22(3)(b) of POTA. The offences came to be registered *vide* C.R. bearing No. 16 of 2003 in the DCB Crime, Ahmedabad City. In the aftermath of burning of Sabarmati Express, riots had erupted all over Gujarat and minority community suffered loss of life and property. To avenge the loss to the minority community, certain persons decided to react by adopting anti-national activities. Several young persons from minority community took training in terrorist activities in Pakistan and necessary funds for the training was required to be collected. Four persons, who had taken training, were apprehended in Ahmedabad. During the course of investigation, an Intelligence Report was received that the property named Green Bungalow, which belonged to Sharifkhan and situated in Mirzapur Court Premises, was developed by certain persons, including the present respondent. The money, which was received, was to be

utilised for anti-national activities. As per the statements of Dinesh Jayantilal Shah, Deepak Lalbhai Shah and Aswin Jayantilal Shah, who were the original owners of Green Bungalow, they sold the property to Sharifkhan, for which *Banakhat* was entered on 20-07-2004 and huge amount of Rs. 47 Lakh was handed-over to these witnesses by unnamed witness B-50 and the transaction was done at the residence of the co-accused H. N. Jhala. During the aforesaid transaction, the respondent was present. In the said transaction, false documents were prepared in the name of Jhala for which the amount was paid to the original owners. The present respondent played very vital role and was responsible for taking one person to the residence of Jhala. Even the statements of the tenants occupying Green Bungalow indicate that the respondent along with other co-accused had approached these persons and informed them that Jhala was the new owner of the property and they were managing the property on his behalf.

3. Mr. L. R. Pujari, learned Additional Public Prosecutor, submitted that the learned Special Judge (POTA) has, while deciding the bail application, erred in law and evidence on record of the case in granting bail to the respondent. It is submitted that taking into account the entire gamut of evidence placed before the learned Special Judge, the respondent could not have been enlarged on bail. The learned Special Judge has not appreciated the documents and other materials placed before her in

proper perspective while allowing the bail application of the respondent. The learned Judge has erred in holding that as *prima facie* no connectivity of the respondent was established in the commission of offence, he is required to be released on bail. The learned Judge has erred in holding that the role of the respondent and the evidence, which was available against him, was extremely sketchy and, therefore, he is required to be released on bail. The learned Additional Public Prosecutor further submitted that taking into consideration - the role attributed to the respondent, the gravity of the offence and the connectivity of the accused with the commission of offence - bail ought not to have been granted by the learned Special Judge and it is a fit case for cancelling the bail under Section 34 of POTA. In view of the facts and circumstances of the case, the appeal preferred by the State requires to be allowed and the order passed by the learned Special Judge in Criminal Miscellaneous Application No. 1261 of 2005 be quashed and set aside.

4. As against the aforesaid submissions, Mr. S. V. Raju, learned Advocate representing the respondent-accused, submitted that taking into account the role attributed to the respondent in the commission of offence, the learned Special Judge has rightly granted the bail. The nature of evidence against the respondent was considered by learned Special Judge by relying on the contemporary record of the case and as no egregious error is committed by

the learned Special Judge, the order for enlargement of appellant on bail requires to be upheld. The learned Advocate further submitted that the learned Special Judge has, after going through the evidence on record, rightly held that the evidence against the respondent was very sketchy, and, therefore, it was a fit case to release the respondent on bail. Save and except the proximity of the respondent with his Senior Colleague Jhala, there is nothing on record to suggest the direct involvement of the respondent in the commission of crime and, therefore, the learned Special Judge has rightly allowed the application preferred by the respondent and granted bail. The learned Advocate submitted that the learned Judge has rightly held that as the transcript of the telephonic conversation was also not produced along with the charge-sheet papers so as to indicate the involvement of the respondent in the commission of offence, the respondent was required to be enlarged on bail. Thus, the learned Advocate submitted that considering the above mentioned facts and circumstances, there is no reason to interfere with the order passed by the learned Special Judge under Section 34 of the POTA and the application preferred by the State is liable to be rejected.

5. This Court has heard Mr. L. R. Pujari, learned Additional Public Prosecutor for the appellant-State and Mr. S. V. Raju, learned Advocate for the respondent-accused, at length and in great detail. This court has also undertaken a complete

and comprehensive appreciation of all vital features of the case and the evidence.

6. The learned Special Judge has taken into account the role attributed to the respondent in the commission of offence while enlarging him on bail. The conspiracy aspect is discussed in great detail by the learned Judge while considering the role played by the respondent. On perusal of the detailed order, the evidence against the present respondent is very sketchy. As per the report dated 22-11-2004 submitted by the Assistant Commissioner of Police, the role of the respondent is shown to be very limited. A sum of Rs. 2.70 Lakhs was given by the respondent to one of the employees of Angadia firm – Saumilkumar Arvindkumar and Company on 03-11-2004, which was later seized by the Investigating Officer. It was required to be sent to Mumbai to one Bittubhai whose mobile number was revealed on the receipt bearing No. 2601. As the Crime Branch had intimated the firm of the money being suspicious in nature and was likely to be used for the purpose of spreading terrorism, the firm was directed to stop the payment and, therefore, the payment was stopped. Further, within two days of sending this amount, Mustaqali Saiyed, his colleague, an Advocate, called up to inquire about the non-receipt of money by Bittubhai and as the amount belonged to Sharifkhan, he threatened Angadia firm of dire consequences if any mistake was committed by the firm. The money was to be given by one Umar Sultan, who also dealt with

Angadia firm in the past from Dubai. It was also revealed during the course of investigation that the original owners of Green Bungalow i.e. Dinesh J. Shah, Deepak Shah, Aswin J. Shah, Harish Laljibhai Shah were contacted in the year 1991 by an Estate Broker Ramzanali Abdul Karum Vaidya and the amount of consideration was fixed to the tune of Rs. 65 Lakhs and on 31-08-1991, out of which sum of Rs. 1 Lakh was paid by two persons who came with Ramzanali and were introduced as Sharifkhan and Javedkhan. This sum of Rs. 1 Lakh had been paid in cash and they ensured to pay further Rs. 64 Lakhs within one month and to get the sale deed in the name of any Hindu person as the Disturbed Area Act was prevailing during the aforesaid period. As the Disturbed Area Act, 1991 continued to be in operation on 20-07-2004, the agreement to sell, which according to the prosecution, was a camouflage, where the sale consideration was fixed at Rs. 50 Lakhs, had been executed between the owners of the property and H. N. Jhala in the presence of two witnesses where he was to obtain the permission of competent authority within 3 months and to pay the remaining consideration, as the initial consideration paid was Rs. 7 Lakhs. It was notarised by Bhawaniwala, an Advocate-Notary where the stamp-paper of Rs. 50/- bearing No. 12757 was purchased by the respondent. The police papers also revealed that another agreement to sell was effected in favour of Mr. Saiyed as well as the respondent by H. N. Jhala on the very same day and it was notarised. The land was

to be developed by one Liyakat Hussain. The transaction is in respect of property of absconding accused. Save and except the role narrated hereinabove, the evidence and material against the respondent is not adequate enough to reject his bail application. Further, *prima facie*, there was no connectivity of the respondent with the *Jehadi* conspiracy between March 2002 to April 2003. Thus, after taking into account the entire gamut of evidence which was placed before the learned Special Judge as well as taking into account the conspiracy aspect, the learned Special Judge has held that as the connectivity of the respondent as well as the nature of evidence is sketchy, it was a fit case to release the respondent on bail and allowed the bail application.

7. While considering the application for cancellation of bail, certain guidelines laid down by the Hon'ble Apex Court are required to be borne in mind. It is well settled by a catena of decisions rendered by the Hon'ble Apex Court that the power of cancellation of bail is required to be exercised with great care and circumspection as it involves review of the decision already made. It is permitted only, if by reason of supervening circumstances, it would no longer be conducive to a fair trial to allow the accused to retain his freedom during the trial. Thus, very cogent and overwhelming circumstances are necessary to cancel the bail application. Other reasons such as: (i) the accused is found tampering

with the evidence either during investigation or trial; (ii) when the accused is on bail, he commits similar offence or a heinous offence; (iii) when the accused has absconded during the period of bail and trial of the case gets delayed on that account; (iv) misuse of the privilege of the bail granted to the accused – are also equally important and required to be taken into consideration while deciding the application for cancellation of bail. The same analogy applies to the present case also which is for cancellation of bail under Section 34 (4) of the POTA.

8. The learned Special Judge has discussed in great detail about the role of the respondent and after going through the entire case-papers and the material placed before her, enlarged the appellant on bail. It is also evident from the record of the case that no breach was committed by the respondent of the terms and conditions imposed by the learned Special Judge by order dated 09-05-2005 which in our view would warrant interference by this Court under Section 34 of POTA.

9. In view of the foregoing discussion, the application preferred by the State for cancellation of bail, under Section 34 of POTA, is devoid of merits and liable to be rejected. Hence, the following order is passed:

O R D E R

The appeal is dismissed.

[ANIL R. DAVE, J.]

[H. B. ANTANI, J.]

/shamnath